Supreme Court, U.S.
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No. 94-1413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

REBECCA BAKER, A Legally Incapacitated Person,
By WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.

Petitioners,

v.

SEARS, ROEBUCK AND CO.,
A Foreign Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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March 22, 1995

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QUESTIONS PRESENTED

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, WHERE THE COURT OF APPEALS APPLIED THE PROPER SUMMARY JUDGMENT STANDARD, WHERE THE ISSUE PETITIONER SEEKS TO HAVE REVIEWED MERELY REQUIRES A FACTUAL REDETERMINATION BY THIS COURT AND THE OUTCOME IS ONLY OF IMPORTANCE TO THE PARTIES INVOLVED, AND WHERE MICHIGAN LAW MANDATES THE RESULT THE COURT OF APPEALS REACHED?

LIST OF PARTIES

Respondent, Sears, Roebuck and Co., is a corporation organized under the laws of the State of New York and has no parent company. The following is a list of Respondent, Sears, Roebuck and Co.'s significant corporate subsidiaries:

Allstate Insurance Company (Illinois)
Allstate Life Insurance Company (Illinois)
PMI Mortgage Insurance Co. (Arizona)
Homart Holding Company of Delaware, Inc. (Delaware)
Homart Development Co. (Delaware)
Sears Canada, Inc. (Canada)
Sears Acceptance Company, Inc. (Canada)
Sears Roebuck de Mexico, S.A. de C.V. (Mexico)
Sears Overseas Finance N.V. (Netherlands Antilles)
Sears Receivables Financing Group, Inc. (Delaware)
Sears Roebuck Acceptance Corp. (Delaware)
Sears Savings Bank (California)
Western Auto Supply Company (Delaware)

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent accepts Petitioners' Statement of Opinions Below.

STATEMENT OF JURISDICTION

Respondent, Sears, Roebuck and Co., accepts and relies upon the jurisdictional statement set forth by Petitioners in their Petition for Writ of Certiorari, located at pages 2-3.

STATEMENT OF THE CASE

Petitioners' request for writ of certiorari arises from a personal injury action brought by Petitioner Rebecca Baker (Plaintiff-Appellant below, and hereafter "Petitioner")[1] against Respondent Sears, Roebuck and Co. (Defendant-Appellee below, and hereafter "Sears"). In her Complaint, Petitioner claimed damages for injuries allegedly sustained in a fall while descending a stairway in Sears' Highland Park, Michigan store. Petitioner alleged claims for (1) negligence due to the presence of water on the stairs; (2) the allegedly defective design of the stairway; and (3) failure to warn of a defective or dangerous condition. (App. D, pp. 4-6).

Sears denied liability and, following the close of discovery, moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). On September 18, 1992, the District Court for the Eastern District of

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[1]Other named Petitioners are Ms. Baker's legal guardian, William J. Baker, Jr., and her husband, William J. Baker, Sr. Together, the Bakers are referred to herein as "Petitioners."

Michigan, Southern Division, granted Sears' motion in part (with respect to the negligence claim), and denied it in part (with respect to Petitioners' defective design and failure to warn claims). (App. B-16).

On October 1, 1992, Sears requested that the District Court reconsider that portion of its order pertaining to the defective design claim, arguing that Petitioners were belatedly attempting to alter their version of how Ms. Baker fell and that Petitioners offered no evidence to establish that a design defect, assuming one existed, caused her fall. (App. E). The District Court denied Sears' request for reconsideration on October 13, 1992, on the basis that Sears had not originally moved for summary judgment as to Petitioners' design claims. (App. F).

Nevertheless, on October 15, 1992 the District Court directed the parties to submit supplemental briefs that specifically addressed the issue of whether Sears was entitled to summary judgment as to Petitioners' design defect and failure to warn claims. (App. G). After considering both parties' supplemental briefs and responses thereto, the District Court, on December 17, 1992, issued an Opinion and Order granting summary judgment in favor of Sears and a Judgment dismissing Petitioners' Complaint in its entirety. (App. C). Citing this Court's decisions in ***Celotex v. Catrett***, 477 U.S. 317 (1986); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); and the Michigan Supreme Court's decision in

Oppenheim v. Pitcairn, 293 Mich. 475, 294 N.W. 374 (1940) as being controlling, the Court held that even *assuming* the existence of some design defect, Petitioners failed to establish a genuine issue of material fact on the issue of proximate causation. (App. C-11). (". . . Plaintiff has failed to make a showing sufficient to establish the existence of an element essential to plaintiff's case and on which plaintiff has the burden of proof at trial, and thus summary judgment in favor of defendant is proper.")

Petitioners then appealed the District Court's grant of summary judgment in Sears' favor to the United States Court of Appeals for the Sixth Circuit. First affirming the District Court as to Petitioners' negligence claim, the Court of Appeals again cited ***Oppenheim*** and noted that since the only evidence presented on the issue of notice was presented by Sears, Sears was properly granted judgment as a matter of law by the district court. (App. A-4).

With respect to Petitioners' defective design and related failure to warn claims, the Court, relying on the Michigan Supreme Court's opinion in ***Skinner v. Square D Co.***, 445 Mich. 153, 516 N.W.2d 475 (1994), held that because Petitioners failed to offer proof beyond mere speculation as to whether or not the alleged defect caused Petitioner's injury, they did not succeed in proving the existence of any general issue of material fact on an essential element of Petitioner's claim -- proximate cause

-- and Sears was entitled to summary judgment as a matter of law. (App A.-6, 7).

Petitioners filed their Petition for Writ of Certiorari to the Sixth Circuit on January 19, 1995, arguing that by affirming the District Court's grant of Sears' motion for summary judgment, the Court of Appeals sanctioned the application of a summary judgment standard that constituted a departure "from the accepted and usual course of judicial proceedings" pursuant to Supreme Court Rule 10, which sets forth the circumstances under which this Court will exercise its extraordinary power of supervision. (Petition, pp. 13-14).

For the reasons stated herein, Respondent, Sears, Roebuck and Co., respectfully requests that the Court deny Petitioners' Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals used the proper standard in affirming the granting of Sears' summary judgment motion. In upholding the District Court's decision, which cited this Court's controlling decisions of ***Celotex v. Cattrett***, 477 U.S. 317 (1986); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); and ***Matsushita Electrical Industrial Co. v. Zenith Radio Corp.***, 475 U.S. 574 (1986), the Court of Appeals found it clear that since Petitioners' proofs failed to reach beyond the pleadings in this case, there was no genuine issue of material fact pursuant to Fed. R. Civ. P. 56 and Sears was entitled to judgment as a matter of law.

Since the Sixth Circuit applied the proper summary judgment standard, Petitioners' request for writ of certiorari should be denied outright because what Petitioners are really seeking is a mere determination of purely factual issues whose outcome is only significant to the litigants themselves. This Court has held on numerous occasions that it is improvident to grant a petition for writ of certiorari in such situations. ***Houston Oil v. Goodrich***, 245 U.S. 440 (1918); ***Southern Power Co. v. North Carolina Public Service Co.***, 263 U.S. 508 (1924); ***Rudolph v. United States***, 370 U.S. 269 (1962); ***Tacon v. Arizona***, 410 U.S. 351 (1973). Accordingly, Petitioners' request should not be granted simply because they are personally dissatisfied with the result they received below.

Finally, even if the Court were to grant Petitioners' request for certiorari, the Sixth Circuit's decision should be upheld because Petitioners are completely unable to offer any evidence that would create a genuine issue of material fact pursuant to the dispositive Michigan substantive case law governing Petitioners' state law claims. ***See Oppenheim v. Pitcairn***, 293 Mich. 475, 294 N.W. 374 (1940); ***Skinner v. Square D Co.***, 445 Mich. 153, 516 N.W.2d 475 (1994); ***Garabedian v. William Beaumont Hospital***, ___ Mich. App. ___ (released for publication February 6, 1995) (App. H).

I.

THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY AFFIRMING THE DISTRICT COURT, WHERE THE DISTRICT COURT APPLIED THE SUMMARY JUDGMENT STANDARD ANNUNCIATED AND FOLLOWED BY THIS COURT AND GRANTED SEARS' MOTION FOR SUMMARY JUDGMENT.

Petitioners claim that by affirming the District Court's grant of summary judgment in Sears' favor, the Sixth Circuit effectively sanctioned the application of

"summary judgment and/or review standards to the parties in this particular case, which standards are not the norm." (Petition, p. 11). Further, Petitioners refer to the standard applied as being a "dangerous" one which "conflicts with respected and logical law and practice." ***Id.***

On the contrary, the summary judgment standard sanctioned by the Court of Appeals *is* the majority view, set forth by this Court in a trilogy of cases decided in 1986, ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); ***Celctex Corp. v. Catrett***, 477 U.S. 317 (1986); and ***Matsushita Electrical Industrial Co. v. Zenith Radio Corp.***, 475 U.S. 574 (1986) and cited repeatedly since by the Sixth Circuit. ***See., e.g., Patton v. Beard***, 8 F.3d 343 (6th Cir. 1993); ***Macene v. MJW, Inc.***, 951 F.2d 700 (6th Cir. 1991); ***Coffey v. Foamex L.P.***, 2 F.3d 157 (6th Cir. 1993); ***Thompson v. County of Medina***, 29 F.3d 238 (6th Cir. 1994).

Curiously, even Petitioners -- in complete conflict with their own position on this issue -- concede that ***Celotex*** and ***Anderson*** annunciate the proper standard and, along with the Sixth Circuit's decisions in ***E.E.O.C. v. University of Detroit***, 904 F.2d 331 (6th Cir. 1990) and ***Patton v. Beard***, ***supra***, reflect "the majority views of the law." (Petition, p. 14).[2] However, it is notable that

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[2]The Sixth Circuit in ***Patton*** also recognized ***Anderson*** and ***Celotex*** as setting forth the appropriate summary judgment standard.

Petitioners only reference ***Celotex*** and ***Anderson*** by citation and do *not* discuss what the Court *actually held* in those cases regarding the propriety of granting summary judgment. ***Id.*** Instead, they purport to "quote" ***E.E.O.C., supra*** by stating that with respect to the Sixth Circuit's approach to deciding a motion for summary judgment, "the substantive law of the situs mandates 'that all facts must be viewed and inferences drawn in favor of the plaintiffs' for purposes of summary disposition." (Petition, p. 13)

The passage Petitioners purport to cite is not located *anywhere* in the ***E.E.O.C.*** opinion. What Petitioners are actually quoting is Judge Damon Keith's lone dissenting opinion in the Court of Appeals' decision (App. A-8), *not* the Sixth Circuit's majority opinion in ***E.E.O.C.***, as they represent. What the ***E.E.O.C.*** decision *actually* states as being the correct standard under Rule 56(c) is as follows:

> This court, therefore, must now apply a *de novo* standard of review, making all **reasonable** inferences in favor of the non-moving party to determine if a genuine issue of material fact indeed exists.

Id. at 333 (***citing Pinney Dock and Transp. Co. v. Penn. Cent. Corp.,*** 838 F.2d 1445 (6th Cir. 1988); ***Bouldis v. United States Suzuki Motor Corp.***, 711 F.2d 1319 (6th Cir. 1983)) (emphasis added).

The aforementioned passage from ***E.E.O.C.*** is clearly consistent with this Court's opinions in ***Anderson***, ***Celotex***, and ***Matsushita***. In ***Anderson***, this Court addressed the propriety of grafting a "reasonableness requirement" onto the summary judgment standard, stating that:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may **reasonably** be resolved in favor of either party . . . [F]ormerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more **reasonable** rule, . . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251.

Moreover, the Sixth Circuit's holding with respect to the defective design/failure to warn claims -- that Petitioners' claim failed below due to their inability to

point to any evidence that facilitated "**reasonable** inferences of causation, not mere speculation" -- is proof itself that the proper summary judgment standard was applied. ***Anderson, supra***. (App. A-6). This, coupled with Petitioners' own concession that the Court of Appeals in fact used the proper standard, renders Petitioners' argument in this regard a virtual non-issue.

II.

PETITIONERS' REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED WHERE THE ONLY ISSUE REMAINING IS A FACTUAL DETERMINATION ALREADY DECIDED IN SEARS' FAVOR BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS AND THE OUTCOME IS OF INTEREST ONLY TO THE PARTIES INVOLVED IN THIS PARTICULAR CASE.

This Court has repeatedly held that a writ of certiorari, once bestowed by the Court, must be dismissed as improvidently granted where the issues to be decided merely require a redetermination by the Court of purely factual issues whose outcome is of importance only to the particular litigants involved. ***Houston Oil Co. v. Goodrich,*** 245 U.S. 440, 62 L.Ed. 385, 38 S. Ct. 140 (1918) (certiorari dismissed as improvident where petitioner claimed that the Court of Appeals

incorrectly affirmed the District Court on an issue that would depend on the Court's reevaluation and appreciation of the evidence); ***Southern Power Co. v. North Carolina Public Service Co.***, 263 U.S. 508, 68 L.Ed. 413, 44 S. Ct. 164 (1924); ***Rudolph v. United States***, 370 U.S. 269, 8 L.Ed. 2d 484, 82 S. Ct. 1277 (1962) (tax issue which depended on a redetermination of factual questions by the Court and was of importance only to the parties to the case inappropriate for review by writ of certiorari); ***Tacon v. Arizona***, 410 U.S. 351, 35 L.Ed. 2d 346, 93 S. Ct. 998 (1973) (certiorari improperly granted where only issue raised below was factual issue of whether party's conduct constituted a waiver of right to be present at trial).[3]

In this case, since it is clear that the summary judgment standard applied by the District Court and sanctioned by the Court of Appeals did *not* constitute a departure "from the accepted and usual course of judicial proceedings," entitling Petitioners to have their case reviewed by this Court, what Petitioners are actually

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[3]Similarly, one commentator has noted:

> The Court should not grant cases solely to correct error as it affects the individual litigants. As manager, it should intervene strategically, to maximize the impact of **occasional** review of **egregious** error in order to ensure responsible actions by lower courts. We would **not** expect many cases to fall in this category.

New York University Supreme Court Project: A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study; 59 N.Y.U. L. Rev. 681.

asking this Court to do is to make a *redetermination* of the facts of this case because those facts were not evaluated to their satisfaction by the lower courts. Petitioners' personal displeasure with the District Court and Court of Appeals' alleged fact-finding does not constitute grounds for granting certiorari under Supreme Court Rule 10. As already stated, it does not require an exercise of the Court's "power of supervision." Nor does it call into question conflicting decisions among the circuit courts of appeals, conflicting decisions of the Court of Appeals with the state court of last resort with respect to a federal question, or an important question of federal law. (*Id.*, Sections (1)(a)-(c)). As such, there are no grounds present in this case for granting Petitioners' request for certiorari, and their Petition should be dismissed outright on this basis alone.

III.
MICHIGAN LAW COMPELLED THE COURT OF APPEALS' DECISION.

Even assuming, ***arguendo***, this Court were to grant Petitioners' request for writ of certiorari, it should uphold the Court of Appeals' decision, which applied Michigan case law that is factually on point with this case to determine that no genuine issue of material fact exists as to Petitioners' substantive claims and affirmed the District Court's grant of Sears' summary judgment motion. This consideration of substantive state law in

the context of a Rule 56 motion was explained and approved of by this Court in ***Anderson, supra***:

> [T]hus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. **The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not.**

Id. (emphasis added).

First, with respect to Petitioner's negligence and failure to warn claims, both the District Court and Sixth Circuit applied the Michigan Supreme Court's controlling decision in ***Oppenheim v. Pitcairn***, 293 Mich. 475, 294 N.W. 374 (1940). In ***Oppenheim***, the plaintiff claimed that the defendant train station was negligent when she was injured after slipping on water on the defendant's floor.

Nevertheless, the plaintiff in ***Oppenheim*** was unable to offer any proof as to whether or not the allegedly unsafe condition was known to the defendant, or whether the defendant should reasonably have had

such knowledge. Finding that one of the essential elements of the plaintiff's ***prima facie*** case of negligence had not been proven, the trial court directed a verdict for the plaintiff.[4] Similarly, in this case, the Court of Appeals found that since Petitioners offered absolutely *no* evidence on the issue of whether or not Sears had notice of the allegedly dangerous or defective condition, Petitioners did not meet their burden of proof and affirmed the grant of Sears' summary judgment motion.

Furthermore, with respect to Petitioners' defective design and failure to warn claims, the Sixth Circuit applied the dispositive Michigan Supreme Court case, ***Skinner v. Square D Co.***, 445 Mich. 153, 516 N.W.2d 475 (1994), which was decided *after* the District Court rendered its opinion in favor of Sears. In ***Skinner***, the plaintiff's decedent sued the defendant manufacturer, claiming that the decedent's electrocution was caused by a defective switch manufactured by the defendant.

There were no witnesses to the accident in ***Skinner***, and the plaintiff was forced to rely on circumstantial evidence to prove causation. The plaintiff

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[4]With respect to the relationship between a motion for summary judgment pursuant to Rule 56 and a motion for directed verdict under Rule 50, this Court has acknowledged that "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. at 251.

offered a variety of causation theories, each of which called for speculation as to what could have caused the accident. Upholding the Michigan Court of Appeals' decision granting summary judgment to the defendant manufacturer, the Michigan Supreme Court held that **"the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation . . . [T]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation . . ."** *Id.* at 163-165 (emphasis added) (citations omitted).

As was found by both the District Court and the Court of Appeals, the facts in this case are undisputed and very similar to those in ***Skinner***. Ms. Baker does not remember falling on the stairs at Sears or anything else about the circumstances of her mishap. (App., A-5; B-3). Nancy Craig, the woman who was accompanying her and the only person present at the time of the accident, never actually saw her fall and does not know what caused her to fall. (App. A-3, 5). Petitioner's so-called "expert," Walter Cygan, testified as to hypothetical situations wherein the design of Sears' staircase might be considered defective if an individual were to step on it, but could not add any independent information regarding the particular circumstances of her fall. (App. A-5, 6). Finally, perhaps the most telling fact of all in this case is the fact that even *Petitioners' counsel* concedes that

"there is no way to verify what Petitioner saw or actually slipped on." (App. A-5).

Faced with these facts, the Sixth Circuit, citing ***Skinner***, stated as follows:

> . . . while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof 'must facilitate reasonable inferences of causation, not mere speculation.' ***Id.*** at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. ***Id.***[5]

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[5]This is the very same passage that Petitioner cites verbatim in her Petition -- without (conveniently) even mentioning the ***Skinner*** case -- and claims that it was a "subjectively stated" finding of the Court of Appeals. On the contrary, since the references to ***Skinner*** are conspicuously noted in the passage, it is obvious that Petitioner's mischaracterization of the Sixth Circuit's holding on this issue as being "subjective" is false. Indeed, perhaps there is nothing *less* "subjective" than what the Court of Appeals did in this

Because the only "evidence" Petitioners presented -- inadmissible hearsay statements and expert testimony with no underlying evidentiary basis in the record -- was insufficient as a matter of law to create a genuine factual issue, the Court of Appeals affirmed the District Court and held that summary judgment was properly granted in favor of Sears.[6]

Petitioners argue that in so holding, the Court of Appeals improperly "weighed the evidence," "made credibility determinations," and "did not view all facts nor draw all inferences in favor of Petitioners." (Petition, p. 12). This assertion is categorically false. On the contrary, Petitioners did not even *offer* any facts to counter Sears' motion with respect to their negligent

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case--follow Michigan substantive law that is directly on point and completely dispositive of Petitioners' design defect and failure to warn claims.

[6]With respect to Petitioners' expert, the Court of Appeals relied on ***Skinner*** for the proposition that "there must be facts in evidence to support the opinion testimony of an expert." (App. A-6). There being no facts and no testimony offered by Petitioners upon which an expert could form an opinion as to the cause of her fall, there was no support for the expert's hypothetical testimony and this evidence was properly ignored. Furthermore, with respect to Petitioners' attempt to use the testimony of Petitioner's sister, who was supposedly prepared to testify that Petitioner had told her after the fall that she had slipped on a dry area of the stairs, the District Court properly found that such testimony "failed to go beyond the pleadings," was hearsay, and was thus inadmissible as a matter of law. (App. C-7, 8).

maintenance claim in the first instance. (App. A-4). Thus, there was no evidence to "weigh." Moreover, Petitioners fail to point out where in the Court of Appeals' opinion any "credibility determination" as to Plaintiff's expert was made. The Court merely determined that, even assuming the truth of the expert's testimony, it would not, without factual support in the record, be sufficient to singularly overcome a motion for summary judgment. (App. A-5, 6).

Furthermore, every possible inference *was* drawn in favor of Petitioners by both the District Court and the Court of Appeals. For the purposes of Sears' motion, it was *assumed* that Petitioners' expert would qualify as an expert under the Federal Rules of Evidence, *and* that Petitioners could prove the elements of duty, breach and damages with respect to their design defect claim. The only inference *not* drawn by the courts below was that essential element of their defective design/failure to warn claim on which the Petitioners could not offer any shred of evidence to create a factual issue--the element of causation. Indeed, ***Celotex, supra***, does not allow such an inference:

> . . . a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. **The moving party is "entitled to judgment as a matter of law "because the non-moving party**

> **has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.**

Id., 106 S.Ct. at 2252 (emphasis added).

Furthermore, the Michigan Court of Appeals has, very recently, decided a case with facts analogous to this case. In ***Garabedian v. William Beaumont Hospital***, ____ Mich. App. ____ (released for publication February 6, 1995) (App. H), the plaintiff sued the defendant hospital in negligence (malpractice) because she fell out of her bed and broke her hip. She was asleep at the time of the incident. As in this case, no one witnessed her fall. The only attempt at proving causation made by the plaintiff was her expert's supposition that "an evaluation of plaintiff's mental condition [to determine if she needed restraining] may have indicated a need for some type of intervention. ***Id.*** at 1. Citing ***Skinner*** as controlling, the court in ***Garabedian*** held that the "mere possibility of . . . causation is not enough; and when the matter remains of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ***Id.*** at 163.

Although the Michigan Supreme Court's decision in ***Skinner*** is dispositive, the ***Garabedian*** decision lends even more support for the proposition that Petitioners

here were required to come forth with more than mere conjecture as to what "might" have caused Ms. Baker's fall. Petitioners argue that "strong public policy" -- that of considering public safety "as a condition precedent to opening a store in a community" -- compels the Court to grant their Petition. On the contrary, it is the policy underlying ***Skinner*** and ***Garabedian, supra*** -- that of disallowing the victims of unwitnessed, yet unfortunate accidents to recover from parties whom they cannot prove were responsible for their injuries -- that prompted the Court of Appeals to affirm the well-reasoned decision of the District Court in this case.

Finally, Petitioners -- once again ignoring the fact that they cannot prove that Sears caused Ms. Baker's injuries -- revealingly state that the Court should feel free to grant their Petition in this case because "Sears has been and will do well regardless of the outcome." (Petition, p. 15). Such a ridiculous assertion is completely antithetical to the requirement of proving fault that is intrinsic to negligence law and is not a principle that should be espoused by any court.

Respondent Sears, Roebuck and Co. respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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March 22, 1995

No. 94-1413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

REBECCA BAKER, A Legally Incapacitated Person,
By WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.

Petitioners,

v.

SEARS, ROEBUCK AND CO.,
A Foreign Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S APPENDIX

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

REBECCA BAKER, a Legally Incapacitated Person, by WILLIAM J. BAKER, JR., Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs,

vs.

SEARS, ROEBUCK AND COMPANY, INC, a foreign corporation,

Defendant.
_____/

ROTH AND DEAN, P.C.
SANFORD ROTH (P19693)
Attorney for Plaintiffs
3000 Town Center, Suite 450
Southfield, Michigan 48075
(313) 358-0100
_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

COUNT I

GENERAL ALLEGATIONS

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NOW COME the Plaintiffs, REBECCA BAKER, a legally Incapacitated Person, by her Guardian, WILLIAM J. BAKER, JR., and WILLIAM J. BAKER, SR., by and through their attorneys, ROTH AND DEAN, P.C. , and for her Complaint against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., states as follows:

1. Plaintiff is a resident of the City of Oak Park, County of Oakland, State of Michigan, and William J. Baker, Jr. has been appointed Guardian of Rebecca Baker, a legally incapacitated person, on March 8, 1991, by the Honorable Eugene Arthur Moore, Oakland County Probate Judge.

2. Defendant, Sears, Roebuck and Company, Inc. (hereinafter referred to as defendant "Sears"), is a foreign corporation qualified to do business in the County of Wayne, and the State of Michigan.

3. The amount in controversy exceeds the sum of Ten Thousand dollars ($10,000) and is otherwise within the jurisdiction of this Honorable Court.

4. On January 5, 1991, at approximately 11:00 a.m., plaintiff was on the premises of defendant's store in Highland Park, Michigan.

5. Plaintiff was lawfully upon said premises and had gone there for the purposes of shopping and purchasing consumer goods; plaintiff had reason to be on the second floor of the defendant's premises.

6. Plaintiff was a business invitee of the defendant on the aforementioned date.

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7. Upon alighting from the second floor of defendant's premises to exit the building, the plaintiff began traveling down a staircase open to the general public.

8. As plaintiff descended down the aforementioned staircase she was caused to suddenly and without warning fall heavily in the stairwell due to the defective condition of the aforementioned staircase.

9. Plaintiff fell heavily in the stairwell, striking her head, back, knees and ankles onto the staircase.

10. The plaintiff was sent to Detroit Osteopathic Hospital wherein she was examined and treated by the emergency room physicians.

11. Plaintiff continues to suffer severs and permanent injuries in addition to medial expenses as a result of the injury which occurred on January 5, 1991.

12. That as a result of the aforementioned severe, progressive and permanent injuries sustained, your plaintiff, REBECCA BAKER, has suffered severe and excruciating pain, both mental and physical, and because of the nature and permanency of the injuries sustained, plaintiff will continue to suffer great pain in the future.

13. That prior to the injuries sustained, your plaintiff, REBECCA BAKER, was an able-bodied female capable of earning good sums of money in her employment and because of the nature and permanency

of the injuries sustained, plaintiff was unable to continue her employment over a long period of time and your plaintiff's earning capacity has been greatly diminished, if not permanently curtailed.

14. That prior to the injuries sustained, your plaintiff, REBECCA BAKER, was an able-bodied female, capable of performing her household duties, her hobbies and entertainment and because of the nature and permanency of the injuries sustained, she was unable to continue such activities over a long period of time.

WHEREFORE, Plaintiffs, REBECCA BAKER, by her Guardian, WILLIAM J. BAKER, JR. and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

COUNT II

NEGLIGENCE

15. Plaintiff hereby incorporates by reference hereto, each and every allegations set forth in plaintiff's Complaint herein in Count I as if same were set forth herein paragraph by paragraph and work for work.

16. Defendant Sears owed a duty to business invitees to keep its premises free from dangerous defects and conditions and to reasonable inspect and discover said defects.

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17. Defendant allowed the above mentioned staircase to exist in a dangerous condition while being used by said business invitees.

18. That at all times relevant herein, plaintiff exercised reasonable care and is entirely free from any negligence contributing thereto.

19. Defendant breached the aforementioned duty by allowing the above mentioned staircase to be used by business invitees while ion a defective condition.

20. Defendant neglected and failed to carry out the duties as described hereinabove and breached the same in the following ways, among others:

a. Failed to properly maintain its premises in that it allowed a dangerous condition to exist in the form of a defective staircase upon which business invitees were required to walk;

b. Carelessly and negligently permitting said staircase to remain in a slippery, dangerous and defective condition and not exercising reasonable care to correct said condition;

c. Failure to take reasonable precautions to remove the slippery substance from said staircase so as

to make the stair case suitable for walking thereon;

d. Failed to take reasonable precautions to make the above mentioned staircase safe and suitable for walking thereon;

e. Knew or should have know that the above mentioned staircase was in the defective and unsafe condition;

f. That if defendant made any attempt to maintain the above mentioned staircase, defendants actions were performed in such a manner so as to increase the hazard to the plaintiff herein;

g. Failed to warn the plaintiff of a defective and hazardous condition of the above mentioned staircase which the defendant knew or should have known existed at the aforementioned time;

h. Failure to place a covering/runner on the individual stairs in the above mentioned staircase.

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21. Defendant's negligence was a direct and proximate cause of the injuries and damages sustained by the plaintiff herein.

22. As a proximate cause of the negligence of the defendant, while plaintiff was walking upon the aforementioned staircase owned and operated by the defendant and while in the exercise of due care and caution, slipped on the aforementioned defective staircase, which had been negligently allowed to remain in a defective state, causing the plaintiff to fall and suffer severe and permanent injuries.

WHEREFORE, Plaintiffs, REBECCA BAKER, a legally incapacitated person, by her Guardian, WILLIAM J. BAKER, JR., and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., in an amount in excess of Ten Thousand Dollars ($10,000), and in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

COUNT III

LOSS OF CONSORTIUM

23. Plaintiff hereby incorporates by reference hereto, each and every allegation set forth in plaintiff's Complaint herein in count I and count II as if same were set forth herein paragraph by paragraph and word by word.

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24. At all times relevant hereto, the plaintiff, Rebecca Baker, was and is the legally weed wife of the plaintiff, William J. Baker, Sr.

25. As a direct and proximate result of the conduct of the defendants hereinabove alleged, plaintiff, William J. Baker, Sr., suffered and is continuing to suffer the loss of his wife's service, society, companionship and consortium.

26. As a further direct and proximate result of the conduct of the defendant hereinabove alleged, the plaintiff, William J. Baker, Sr., did pay and incur, and will be compelled for a long period of time to pay and incur, large sums for the care and treatment of the plaintiff, Rebecca Baker, for the above mentioned pain and suffering.

WHEREFORE, Plaintiffs, REBECCA BAKER, a legally incapacitated person, by her Guardian, WILLIAM J. BAKER, JR. and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC. in an amount in excess of Ten Thousand Dollars ($10,000), and in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

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COUNT IV

DAMAGES

27. Plaintiff hereby incorporates by reference hereto, each and every allegation set forth in plaintiff's Complaint herein in Count I and Count II as if same were set forth herein paragraph by paragraph and work for work.

28. As a direct and proximate result of the negligence of the defendant. plaintiff, Rebecca Baker, suffered physical and mental pain and suffering, as well as physical injury, including but not limited to:

a. Injuries to the head;
b. Injuries to the right ankle;
c. Injuries to the left ankle;
d. Injuries to the knees;
e. Contusions and bruising.

29. As a further and proximate result of the aforementioned negligence of the defendant, plaintiff was caused the following additional damages:

a. Hospital, medical and pharmaceutical expenses, past, present and future;
b. Loss of earnings and earning capacity, past, present and future;
c. Severe pain and suffering, emotional and physical, past, present and future;

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d. Severe disfigurement, embarrassment, mortification and humiliation which will continue for her natural life;

e. Loss of the ability to enjoy life.

30. The above mentioned conditions are permanent in nature and duration and plaintiff is expected to suffer the same for the remainder of her natural life.

31. In the event that it is determined that the plaintiff was suffering from any pre-existing condition on or about the date set forth in this Complaint, then it is averred and alleged that the negligence of the defendant proximately resulted in the aggravation, precipitation and/or exacerbation of said pre-existing condition.

WHEREFORE, Plaintiffs, REBECCA BAKER, a legally incapacitated person, by her Guardian, WILLIAM J. BAKER, JR. and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., in an amount in excess of Ten Thousand Dollars ($10,000), and in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

ROTH AND DEAN, P.C.

BY: _____

SANFORD ROTH (P19693)
Attorney for Plaintiffs
3000 Town Center, Suite 450

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Southfield, Michigan 48075
(313) 358-0100

Dated: September 24, 1991

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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, a Legally
Incapacitated Person, by
WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.,

Plaintiffs,

Case No. 91 CV 75687 DT

v. Hon. Lawrence P. Zatkoff

SEARS, ROEBUCK AND CO., a
Foreign Corporation,

Defendant.

_____/

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Charles C. DeWitt, Jr. (P26636)
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_____/

MOTION FOR RECONSIDERATION REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Sears, Roebuck and Co., by its attorneys, Dykema Gossett, moves this Court pursuant to Fed. R. Civ. P. 56(c) and Local Rule 7.1 (h) for reconsideration of defendant's July 17, 1992 Motion for Summary Judgment and that part of the Court's August 18, 1992 Memorandum Opinion and Order denying in part defendant's motion. Defendant moves for reconsideration on the basis that plaintiff failed in its response to defendant's motion to offer admissible evidence establishing that the alleged design defects caused plaintiff's injuries and the Court in its Opinion and Order did not address plaintiff's inability to establish this element of their prima facie negligence claim against defendant.

WHEREFORE, defendant Sears, Roebuck and Co. respectfully requests that this Court reconsider its

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APPENDIX E

August 18, 1992 Memorandum Opinion and Order denying in part defendant's Motion for Summary Judgment as to plaintiff's negligent design claim and grant defendant's motion for summary judgment in its entirety.

Respectfully Submitted,

DYKEMA GOSSETT

By: _____

Charles C. DeWitt, Jr. (P26636)
Michael P. Cooney (P39405)
Attorneys for Defendant
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6953 or 568-6955

Dated: October 1, 1992

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APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, A legally
Incapacitated Person, by
WILLIAM J. BAKER, JR.,
Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs,

vs. CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.

_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of

Michigan, on the 13th day of October 1992.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendant Sears, Roebuck and Company's ("Sears") motion for reconsideration of a Memorandum Opinion and Order granting in part and denying in part Sears' motion for summary judgment. Sears, in its brief in support of summary judgment, stated that:

> The undisputed facts in this case demonstrate that the defendant is entitled to summary judgment on two separate and independent grounds: (1) Because Plaintiff knew of the allegedly hazardous condition before her fall, Defendant has no duty to warn of the open and obvious danger [water]; and (2) Plaintiff cannot establish that the allegedly hazardous condition was present for any length of time such that Defendant had or should have had notice of the condition.

Sears' entire theory upon which it brought the motion for summary judgment was centered around the presence of water of the stairs. Plaintiff, in her response brief and in accordance with the complaint in this case,

stated that defendant's liability rested not only on the existence of water on the stairs, but also on the theory of negligent design. Sears, in its reply, argued that plaintiff's expert was not qualified and plaintiff still knew that the steps were slippery because of the water on the steps.

Sears, in its motion for reconsideration, for the first time, raises the issue that plaintiff, as a matter of law, cannot establish that the alleged defective design of the staircase was the proximate cause of plaintiff's injuries. Sears did not move for summary judgment on the theory that plaintiff could not prove the necessary elements to establish a cause of action under plaintiff's defective design claim. Sears' motion for summary judgment was limited to the issue of water on the stairs. This Court, in its Memorandum Opinion and Order, addressed the issue of negligent design solely for the purpose of clarifying the exact issues that were left for trial.

Since defendant did not move for summary judgment on plaintiff's claim that the stairs were defectively designed, it is entirely inappropriate to raise this issue on a motion for reconsideration. One cannot accomplish in a motion for reconsideration what one did not seek in its motion for summary judgment.

Accordingly, defendant's motion for reconsideration is **DENIED.**

IT IS SO ORDERED.

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LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, A legally Incapacitated Person, by WILLIAM J. BAKER, JR., Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs.

vs.

CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.

_____/

ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 15th day of October 1992.

APPENDIX G

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

This Court ORDERS that plaintiff and defendant submit supplemental briefs addressing plaintiff's claim that the staircase was defectively designed and whether defendant is entitled to summary judgment on this issue. This Court did not address this issue in its Memorandum Opinion and Order dated September 18, 1992, because defendant did not move for summary judgment on this issue. This fact that the issue was raised in plaintiff's response and in defendant's reply did not give this Court power to grant summary judgment on this issue. The parties shall have seven (7) days from the date of this Order to file their supplemental briefs.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT COURT

Appendix H

STATE OF MICHIGAN
COURT OF APPEALS

SARAH GARABEDIAN,

Plaintiff-Appellant/
Cross-Appellee,

v

William Beaumont Hospital,

Defendant-Appellee/
Cross-Appellant.

For Publication
February 6, 1995
9:00 a.m.

No. 159869

L.C. No. 91-405887-NH

Before: Taylor, P.J., and Holbrook and M.E. Dodge. [*]JJ.

Taylor, P.J.

Plaintiff appeals as of right from the circuit court's order granting a directed verdict in favor of defendant. The principal issue on appeal is whether plaintiff presented sufficient evidence of causation to allow the matter to go to the jury. We affirm.

Plaintiff, an 87-year-old woman, had been taken by her daughter, Agnes Nassar, to the William

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[1]Circuit Judge, sitting on the Court of Appeals by assignment.

Appendix H

Beaumont Hospital Emergency Room with a terrible headache and sudden blindness. Ms. Nassar was only allowed to visit plaintiff for 5 minutes each hour. Ms. Nassar testified that plaintiff's mental condition deteriorated after she received medication and described her condition as "out of it." Concerned that the siderails on plaintiff's bed were not up, Ms. Nassar told the nurses she felt plaintiff was going to fall off the bed. The nurses said they were watching her. However, plaintiff did fall off the bed and an x-ray showed she broke her hip.

Registered Nurse Sharon LaMarre testified that to comply with the standard of care, a registered nurse is required to conduct a nurse's assessment including an ongoing assessment of plaintiff's mental condition. Her review of plaintiff's medical record indicate that such an assessment was not made in this case. LaMarre further opined that an evaluation of plaintiff's mental condition may have indicated a need for some type of intervention. For example, having a family member or a nurse stay with the patient. LaMarre concluded that, had such intervention occurred in this case, the accident might have been prevented.

In granting the motion for directed verdict, the trial court reasoned that the case was virtually devoid of any showing of breach of duty and proximate cause. Initially, we note that the court's statement regarding there being no evidence of a breach of duty was

erroneous because it was not argued by defendant in seeking a directed verdict. Pursuant to MCR 2.515, a party must state specific grounds in support of a motion for directed verdict. On appeal, we will not review grounds for sustaining a directed verdict which were not articulated to the trial court. McClain v Alger, 150 Mich App 306 312-313; 388 NW2d 349 (1986). Accordingly, the only issue we must determine is whether plaintiff presented sufficient evidence regarding causation.

In reviewing a ruling on a motion for directed verdict, the court is to examine the evidence presented in a light most favorable to plaintiff. Locke v Pachtman, 446 Mich 216, 223; 521 NW2d 786 (1994); Morrow v Boldt, 203 Mich App 324, 327; 512 NW2d 83 (1994). Granting plaintiff every reasonable inference and resolving any conflict in the evidence in plaintiff's favor, Goldman v Phantom Freight, 162 Mich App 472, 477; 413 NW2d 433 (1987), we agree with the trial court's conclusion that reasonable minds could not differ on the question of causation.

Because plaintiff does not recall how she fell from the bed, and because there were no witnesses to the fall, plaintiff must rely on circumstantial evidence to establish the casual link between defendant's alleged negligence and the harm suffered. Skinner v Square D Co. 445 Mich 153, 163: 516 NW2d 475 (1994). "To the adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere

speculation." Id. at 164. According to LaMarre's testimony, if plaintiff had been adequately evaluated, the evaluation might have revealed a need for intervention, and that intervention might have prevented plaintiff's injury. Plaintiff's attenuated theory of causation does not establish a reasonable basis for concluding that it is more likely than not that defendant's conduct was the cause of plaintiff's injury. Id. at 165. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Id. We cannot conclude that plaintiff's injury is attributable to defendant's alleged failure to evaluate and chart plaintiff's condition. Boyd v Wyandotte, 402 Mich 98, 105; 260 NW2d 439 (1977).

Given our resolution of this issue, we find it unnecessary to address the issue advance in defendant's cross-appeal.

Affirmed.

/s/ Clifford W. Taylor
/s/ Michael E. Dodge

Appendix H
STATE OF MICHIGAN
COURT OF APPEALS

SARAH GARABEDIAN,

Plaintiff-Appellant/
Cross-Appellee,

v

William Beaumont Hospital,

Defendant-Appellee/
Cross-Appellant.

For Publication
February 6, 1995
9:00 a.m.

No. 159869

L.C. No. 91-405887-NH

Before: Taylor, P.J., and Holbrook, Jr., and M.E. Dodge., **JJ.

HOLBROOK, Jr., J. (dissenting).

Viewing the evidence in a light most favorable to plaintiff, and permitting every reasonable inference in her favor, I would find that plaintiff presented sufficient evidence of causation to withstand a motion for directed verdict.

According to plaintiff's proofs, before falling off the stretcher, plaintiff experienced a severe headache, loss of sight to her right eye, placement in a dark room to reduce eye strain, an x-ray, a CT scan, a lumbar

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[2]Circuit Judge, sitting on the Court of Appeals by assignment.

puncture, insertion of an IV needle, and administration of a sedative and two diuretics. In addition, plaintiff's daughter, Agnes Nassar, was permitted to sit with plaintiff for only five minutes each hour, notwithstanding that Nassar had expressed concern to the nurses that plaintiff might fall from bed because plaintiff was "out of it," her bed side rails were not raised, and plaintiff was not otherwise restrained. In light of these facts, coupled with plaintiff's advanced age and disoriented condition, it was beyond mere speculation that she might attempt to get up and go to the bathroom without asking for assistance. Thus, plaintiff's proofs were sufficient to establish a prima facie case that the nursing staff was negligent in failing to appropriately assess and monitor plaintiff's condition, and that had they done so plaintiff's injuries more than likely would have been prevented.

The majority's reliance on Boyd v City of Wyandotte, 402 Mich 98; 260 NW2d 439 (1977), is mistaken. The Boyd Court held that, under the circumstances of that case, a physician's failure to maintain adequate records of a patient's treatment was not a proper theory of recovery under negligence principles. Id. at 104-105. Here, plaintiff's theory is that defendant's employees were negligent in failing to assess and monitor her condition consistent with the appropriate standard of care, and that had they done so it was more than likely that her injury would not have occurred. The majority is therefore mistaken when it

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relies on Boyd as support for the proposition that plaintiff's injury in this case was not "attributable to defendant's alleged failure to evaluate and chart plaintiff's condition."

Plaintiff's circumstantial proofs were sufficient to permit a reasonable jury to infer a logical and substantial nexus between defendant's alleged negligence and plaintiff's injuries. See., e.g. Washington Hospital Center v Martin, 454 A2d 306 (DC App, 1982) Osborn v Public Hospital Dist 1, 80 Wash 2d 201; 492 P2d 1025 (1972); Norris v Rowan Memorial Hospital, Inc. 21 NC App 623; 205 SE2d 345 (1974).

Accordingly, I dissent.

/s/ Donald E. Holbrook, Jr.